

STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2015-0043

**In the Matter of Specified License and Permits¹ of the
Department of Water Resources and U.S. Bureau of Reclamation
for the State Water Project and Central Valley Project
regarding the Executive Director's February 3, 2015 Order and
Subsequent Modifications to That Order**

**ORDER DENYING IN PART AND GRANTING IN PART PETITIONS FOR
RECONSIDERATION AND ADDRESSING OBJECTIONS**

BY THE BOARD:

1.0 INTRODUCTION

By this Order, the State Water Resources Control Board (State Water Board) denies in part and grants in part petitions for reconsideration of the Executive Director's February 3, 2015 Order Approving in Part and Denying in Part a Temporary Urgency Change Petition (TUCP Order) to change requirements of the State Water Project (SWP) and Central Valley Project (CVP) (collectively Projects) to meet water quality objectives in the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay-Delta), and subsequent modifications thereto. In large part, this Order denies the petitions for reconsideration of the TUCP Order and modified orders and finds that the Executive Director's decisions were appropriate when those decisions were made based on the information available at the time. However, this order also grants some of the petitions for reconsideration of the TUCP Order and modifications to the extent that the petitions seek to improve future planning for drought conditions. Specifically, this Order extends the TUCP Order to address actions needed for next year, if conditions continue to be dry, to preserve the public interest, prevent catastrophic impacts to fish and wildlife, and ensure

¹ The petition was filed for Permits 16478, 16479, 16481, 16482 and 16483 (Applications 5630, 14443, 14445A, 17512 and 17514A, respectively) of the Department of Water Resources for the State Water Project and License 1986 and Permits 11315, 11316, 11885, 11886, 11887, 11967, 11968, 11969, 11970, 11971, 11972, 11973, 12364, 12721, 12722, 12723, 12725, 12726, 12727, 12860, 15735, 16597, 20245, and 16600 (Applications 23, 234, 1465, 5638, 13370, 13371, 5628, 15374, 15375, 15376, 16767, 16768, 17374, 17376, 5626, 9363, 9364, 9366, 9367, 9368, 15764, 22316, 14858A, 14858B, and 19304, respectively) of the United States Bureau of Reclamation for the Central Valley Project.

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The state antidegradation policy, State Water Board Resolution 68-16 "Statement of Policy with Respect to Maintaining High Quality of Waters in California" provides in part: "Whenever the existing quality of water is better than the quality established in policies as of the date on which such policies become effective, such existing high quality will be maintained until it has been demonstrated to the State that any change will be consistent with maximum benefit to the people of the State, will not unreasonably affect present and anticipated beneficial use of such water and will not result in water quality less than that prescribed in the policies." State Water Board Resolution 68-16 incorporates the federal antidegradation policy where it is applicable under federal law. (State Water Board Order WQ 1986-17, p. 19.)

The antidegradation policy does not absolutely prohibit any changes in water quality. Rather, any reductions in water quality will depend upon the conditions existing in the specific waters affected, and the benefits of the proposed action. This site-specific balancing is consistent with the scheme established under the Porter-Cologne Water Quality Control Act for setting water quality objectives when issuing waste discharge requirements, setting cleanup levels in cleanup and abatement orders, and other actions.

The Water Board has not violated the antidegradation standard. When water quality is not better than objectives, the federal antidegradation policy requires that existing instream uses and the level of water quality necessary to protect the instream uses be maintained and protected. (40 C.F.R. § 131.12(a)(1).) The Water Board has complied with this requirement. The TUCP Orders balanced competing demands based on the information available at the time, and provided reasonable protection to beneficial uses given the amount of water available. In hindsight, temperature control in the Sacramento River was not satisfactory, but this was not the result of the changes approved by the TUCP Order; rather, elevated temperatures resulted from a Temperature Management Plan that proved to be inadequate. Additional controls will be necessary to ensure adequate temperature control on the Sacramento should the drought persist for a fifth year. Accordingly, this order imposes more stringent planning requirements for 2016.

4.5.2 Executive Director's Authority to Impose Conditions of Approval

The Exchange Contractors et al. contended that the Executive Director did not have authority to impose conditions of approval in the February 3 TUCP Order that restricted exports or the use of water conserved as a result of the changes approved. As mentioned in section 4.3, above,

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the Exchange Contractors et al. argued that the State Water Board must conduct a separate proceeding, and hold an evidentiary hearing, before making changes to the water rights for the Projects. Similarly, SLDMWA et al. contended that Condition 3 of the February 3 TUCP Order was contrary to law because it provided that the Executive Director would determine the use of water conserved as a result of changes approved by the Order. SLDMWA et al. argued that Condition 3 impermissibly expanded the Executive Director's authority in contravention of "numerous laws, regulations, and contractual obligations" that authorize DWR and Reclamation to operate the Projects. The Northern California Water Association (NCWA), which represents Sacramento River settlement contractors, advanced substantially the same argument in an objection filed on February 13, 2015.

NCWA and Feather River settlement contractors (Western Canal Water District, Biggs-West Gridley Water District, Butte Water District, Richvale Irrigation District, and Sutter Extension Water District) also filed objections to the July 3 TUCP Order that took issue with the Executive Director's authority to impose a condition requiring Reclamation to prepare and implement a TMP. NCWA and the Feather River contractors asserted that, before imposing such a condition, the Executive Director was required to make the four findings set forth in Water Code section 1435, including findings that the TMP would not cause injury to other lawful users of water or have an unreasonable effect on fish and wildlife. NCWA also stated that a reduction in releases from Keswick Dam pursuant to the TMP could cause injury to the settlement contractors, who hold water rights that are senior to Reclamation. Similarly, the Feather River settlement contractors asserted that they could be injured by the TMP because restrictions on CVP operations place greater responsibility on Oroville Reservoir to meet Delta water quality requirements and other inbasin uses, thereby reducing the amount of water available from Lake Oroville to meet the needs of DWR's contractors. Both NCWA and the Feather River settlement contractors stated further that reducing deliveries to them would have an unreasonable effect on fish and wildlife by reducing rice acreage, which provides habitat for waterfowl, the giant garter snake, and other species.

In Order WR 2014-0029, the State Water Board rejected similar arguments that the Executive Director lacked authority to impose conditions of approval of the 2014 TUCP. (See Order WR 2014-0029, pp. 21-22, 46-47.) If brief, the Executive Director had authority to impose conditions of approval to the extent necessary to support the findings that were required to be made in order to approve the TUCP. In particular, the conditions restricting exports and requiring a TMP to be implemented were necessary to ensure that the changes to Delta outflow and other water

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quality requirements would be in the public interest and would not result in unreasonable impacts to fish and wildlife. In addition, Reclamation had an independent obligation to prepare a TMP in accordance with Order WR 90-5. Pursuant to that Order, Reclamation is required to maintain a daily average temperature of 56 degrees Fahrenheit at Red Bluff Diversion Dam during periods when higher temperatures would be detrimental to the fishery, and to prepare an operations plan that identifies an alternative compliance location if factors beyond Reclamation's reasonable control preclude Reclamation from meeting the temperature requirement at Red Bluff Diversion Dam. (Order WR 90-5, pp. 54-55.)

The argument that Water Code section 1435 required the Executive Director to make certain findings concerning the effects of the TMP also lacks merit. Water Code section 1435 requires certain findings to be made with respect to the changes proposed by a temporary, urgency change petition, not with respect to any conditions of approval. Moreover, NCWA's and the Feather River settlement contractors' claim that the TMP could cause injury to them was unsupported. As explained in Order WR 2014-0029, Project contractors do not have a legally protected interest in more water than Reclamation and DWR can deliver consistent with the conditions of their water right permits. (Order WR 2014-0029, pp. 21-22, citing *State Water Resources Control Board Cases*, *supra*, 136 Cal.App.4th at p. 806, fn. 54.) Accordingly, the contractors were not entitled to more water under their contracts than Reclamation and DWR could deliver to them consistent with the TMP and other conditions of approval, which became conditions of Project permits during the effective period of the TUCP Orders. In addition, the contractors did not provide any evidence that the TMP could cause injury to their senior water rights by reducing the natural or abandoned flows to which they may have been entitled under those claims of right. Finally, we find that any impacts to fish and wildlife attributable to a reduction in rice acreage were not unreasonable in light of the paramount need to protect endangered winter-run Chinook salmon from extinction.

4.5.3 Consistency of the TUCP Orders with the Public Trust and Reasonable Use Doctrines

CSPA et al. and RTD contended that the TUCP Orders did not properly balance flows required to protect fishery resources against agricultural and other consumptive uses in violation of the public trust and reasonable use doctrines. CSPA et al. faulted the TUCP Orders for failing to balance water supplies for low value crops like pasture and alfalfa with critically depressed public trust resources hovering on the brink of extinction. Petitioners argued that the balancing of competing demands effectuated by the TUCP Orders was invalid because it was not

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